IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FIRST UNION NATIONAL BANK,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	No. 01-CV-1204
BANK ONE, N.A.	:	
and	:	
MELLON BANK, N.A.,	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J. March 28, 2002

Presently before the Court are partial summary judgment motions of First Union National Bank ("First Union") and Bank One, N.A. ("Bank One") and the cross-motion of Mellon Bank, N.A. ("Mellon") for summary judgment. Each party's briefs attempt to establish liability on the loss of $507,598.30 due to a series of events occurring during the collection process of a single check in the same amount (the "Check").

I. BACKGROUND

The subject Check was drawn by LCI International ("LCI") on its account at Bank One, (formerly First Chicago). The Check was made payable to Southern Bell in the amount of $507,598.30. The check was dated January 6, 1998. On January 8,

1998, Southern Bell deposited the Check in its account at First Union. First Union credited Southern Bell's account in the amount on the face of the Check, $507,598.30.

The method of processing checks now in universal use in the United States is by Magnetic Ink Character Recognition ("MICR"). Typically, when a check is presented to a bank for deposit, that banks adds magnetic coding at the lower right-hand side of the check, specifying the amount of the check. However, because of the large quantity of checks processed by Southern Bell, it would pre-encode each item it presented for deposit. Southern Bell encoded upon the MICR line the proper amount of the Check. For some reason, however, the encoding could not be read by First Union's automated reader-sorter equipment, and the Check had to be re-encoded on a strip attached to the bottom. Through what appears to be human error, the Check was re-encoded by First Union in the wrong amount, reflecting that the Check was in the amount of $0.00 rather than $507,598.30.

On January 9, 1998, First Union presented the under-encoded Check to Mellon, an intermediary collecting bank, for collection. The Check was included in a bundle of checks itemized in a cash letter to be processed by Mellon. A cash letter includes the list of checks in each bundle as well as individual tape totals for the bundle and the entire cash letter. When a cash letter is prepared, a reconciliation process occurs

whereby the presenting bank, in this case First Union, must confirm that the amounts which it has credited to its customers' accounts equal the credits they will receive from the drawee bank upon completion of the collection process. The $0.00 encoded Check should have created an imbalance. There were, however, other over-encoding errors in the check bundle First Union presented to Mellon, which worked to offset the under-encoded Check. The errors contained in this bundle of checks created a $102,334.04 imbalance, which First Union credited to Southern Bell in what is called a "forced entry." The under-encoded Check was presented to Mellon in a $9,221,905.83 cash letter. The under-encoded Check was contained in a bundle with the stated tape total of $231,219.42. Upon receipt of the $9,221,905 cash letter from First Union, Mellon also failed to discover any of the under-encoding or over-encoding errors due to the automated process used during the check collection process.

On January 12, 1998, Mellon presented a cash letter to Bank One, which included the under-encoded Check drawn on Bank One. Mellon and Bank One operated under what is known as Same Day Settlement ("SDS") arrangement whereby, provided Mellon presented items by a certain time, Bank One had to settle within the same day. Accordingly, on January 12, 1998, Bank One settled with Mellon, including a $0.00 settlement for the Check at issue. Mellon then settled with First Union prior to its midnight

deadline on January 13, 1998, also including settlement in the amount of $0.00 for the mis-encoded Check.

During this process, the under-encoded Check passed through reader-sorter equipment at each bank. None of the reader-sorter equipment is designed to alert that an item is encoded as $0.00 but, rather, will merely process the item. As a general matter, the use of MICR magnetic encoding means that checks are not manually reviewed. Nevertheless, on January 13, 1998, some unknown person at Bank One realized that the Check had been mis-encoded.

After discovering the error, Bank One debited the account of its customer, LCI, in the face amount of the Check, $507,598.30, and remitted to Mellon the same amount by making a corresponding credit adjustment in a wire transfer sent to Mellon on January 13, 1998. The $507,598.30 was not the only adjustment issued to Mellon by Bank One on that date. The adjustment to the $0.00 encoded Check was combined with another adjustment in the amount of $4,227.30 which related to yet another mis-encoded item deposited three months earlier on October 1, 1997. The total adjustment of $511,765.60 was part of a wire transfer from Bank One to Mellon in the amount of $43,053,398.25.

Mellon alleges that it was unable to determine the nature of this $511,825.60 payment and that, despite its inquiries, Bank One did not provide sufficient information to

enable Mellon to identify First Union as the proper recipient of $507,598.30 from that larger payment. Bank One disputes these allegations, maintaining that it provided complete information through several forms of documentation. Mellon's inability to ascertain the destination for the credits was compounded due to First Union's combination of under-encoding and over-encoding errors that were sent to Mellon by First Union in the original bundle of checks where the under-encoded Check originated. Consequently, because Mellon was unable to ascertain where the credits belonged, it never credited First Union with the $507,598.30, despite the undisputed fact that Bank One remitted to Mellon that amount after discovering that the Check had been mis-encoded.

Mellon placed the $511,825 adjustment from Bank One, including the $507,598.30 corresponding to the Check, into a general ledger suspense account pending research into the proper destination of the funds. At that time, Mellon's policy was that unidentified credits and debits could be held in suspense accounts for thirteen months, while research proceeded, after which they were allocated or charged off in some fashion if they remained unresolved. Such "charge-offs" were done by trying to match unidentified credits with unidentified debits based on three criteria, geographic proximity, proximity in time, and proximity in amount. If an unidentified credit and an

unidentified debit could be “matched” using these criteria, Mellon’s managers would make a judgment call, assume the credit and debit were associated in some way, and charge them off against each other. In this case, the $511,825.60 payment from Bank One remained in Mellon’s suspense account for thirteen months. At the end of the thirteen month period, in March 1999, Mellon alleges that it had not successfully researched the nature of the funds, and that its managers made a charge-off decision using the criteria described above. Specifically, Mellon charged off the $511,825.60 credit against two unidentified debits in the amounts of $251,237.73 attributable to a lost bundle of checks sent to First Citizens Bank and $263,616.10 in undetermined debts.

At some point in the early part of 1999, First Union discovered that the Southern Bell Check for $507,598.30 had been under-encoded for $0.00 and that it had never received payment on the face amount of the Check. First Union contends that at this time it contacted the drawee bank, Bank One, to determine whether Bank One ever made payment on the Check. First Union further alleges that Bank One orally informed First Union that it had no record of paying the Check. Bank One disputes that First Union made such an inquiry and that Bank One made any such representation.

Next, on or about May 3, 1999, First Union presented a photocopy of the Check to Bank One in a cash letter for payment. On certain occasions, it is customary for banks to submit photocopies of checks to be processed as originals, for example when the original item is mutilated or lost. First Union alleges to have relied on Bank One's representation that it had never made payment on the Check in presenting the photocopy to Bank One for payment. First Union submitted the photocopy in a "carrier" (a transparent envelope) often used for the submission of checks and other items for payment. The correct MICR information was encoded on the bottom of the carrier. Any bank using an automated reader-sorter system would process the photocopy in the carrier just like any other item presented for payment. In other words, an automated check processing system would not recognize that the item presented was a photocopy of the Check, but rather would process the item just as if it were the original Check. Bank One then paid First Union $507,598.30 based upon the photocopy of the Check, debiting the account of LCI for a second time in the same amount.

In November, 1999, Bank One learned of the double payment when it was alerted by its customer, LCI, that it had been debited twice for the same check. Accordingly, Bank One reversed the duplicate debit to LCI.

In the summer of 2000, Bank One contacted both First Union and Mellon about its double payment of $507,598.30. In the course of this process, Bank One provided to Mellon identifying information about the $507,598.30 that Mellon alleges was not provided back in January 1998.

The current state of affairs is as follows: (1) First Union credited its customer, Southern Bell, the face amount of the Check, $507,598.30, and collected that same amount from Bank One by presenting a photocopy of the original Check to Bank One in May, 1999. (2) Mellon collected the face amount of the Check in January 1998 after Bank One wire transferred an adjustment upon discovering the encoding error, but never remitted the $507,598.30 to First Union because it lacked proper documentation until such time that Mellon had already applied the amount to other unrelated, unreconciled debts. (3) Bank One paid the face amount of the check twice, once in January 1998 in an adjustment wired to Mellon after discovering the encoding error and once to First Union in May, 1999 after processing a photocopy of the original Check.

First Union contends that Mellon has received $507,598.30 that it is not entitled to keep and that Mellon should forward those funds to First Union, the proper recipient. First Union also contends that it is merely in the middle of this dispute and, acknowledging the undisputed fact that it has

already received payment on the face amount of the Check, has stipulated that if the Court rules in its favor and orders Mellon to pay $507,598.30 to First Union, that First Union would in turn pay over that amount to Bank One.

Bank One contends that First Union is liable to it for repayment of the $507,598.30 because First Union wrongly presented to Bank One a photocopy of the Check that had previously been paid in full, triggering Bank One's mistaken payment of the item for a second time.

Mellon cites the inordinate passage of time before First Union and Bank One were able to identify its negligent conduct leading to Bank One's double payment as grounds for excusing its liability.

II. STANDARD

A motion for summary judgment shall be granted if the Court determines "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "The non-movant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt." Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976). In addition, "[i]nferences to be drawn from the underlying facts contained in the evidential sources

. . . must be viewed in the light most favorable to the party opposing the motion." Id.

III. DISCUSSION

As the foregoing detailed statement of facts demonstrates, the Court is presented with two separate but related sets of questions. The first is the liability of Mellon, as an intermediary collecting bank, for having remitted $0.00 to the depository bank when the face amount of the Check was $507,598.30, and the effect of First Union's encoding error on that liability. The second area of inquiry centers upon First Union's presentment of a photocopy of the Check for payment when the original had in fact already been paid by the drawee bank, Bank One.

A. Applicable Statute of Limitations

The Court will first address Mellon's cross-motion for summary judgment, in which Mellon argues that all claims asserted by First Union and all cross-claims asserted by Bank One against Mellon are barred by the one-year statute of limitations set forth in 12 C.F.R. § 229.38(g).

Bank One complains that Mellon's cross-motion was filed after the deadline set by the Court for submission of dispositive motions and should therefore be dismissed as untimely. The Court's Amended Scheduling Order dated September 20, 2001 specifically provided that all dispositive motions were

to be filed by November 2, 2001. Mellon did not file its cross-motion for summary judgment until November 19, 2001. While the Court does not condone such dilatory conduct, striking Mellon's cross-motion for summary judgment would be an unduly harsh sanction.

First Union complains that Mellon's argument should not be considered because it is repetitive of the argument contained in its motion to dismiss, a dispositive motion already considered and denied by the Court. As no opinion was issued with the Court's Order denying Mellon's motion to dismiss, it will now briefly explain its reasoning as to why Mellon's argument fails.

Pursuant to 12 C.F.R. 229.38(g), any action under subpart C of Regulation CC must be brought "within one year after the date of the occurrence of the violation involved." 12 C.F.R. § 229.38(g). Mellon asserts that the one-year statute of limitations found in Section 229.38 is applicable to all claims for the alleged mishandling of checks among depository institutions, including Fist Union's and Bank One's state law claims. Thus, the question is whether, and to what extent, section 229.38(g) has any preemptive effect on Fist Union's and Bank One's state law claims, particularly the Uniform Commercial Code ("UCC") claims which provide for a three-year statute of limitations.

Generally, federal legislation preempts state law if there is either legislative intent to preempt or an actual conflict between the provisions. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984). Section 4007(b) of Expedited Funds Availability Act ("EFAA"), pursuant to which Regulation CC was promulgated, provides that the EFAA "shall supersede any provision of the law of any State . . . which is inconsistent with this chapter." 12 U.S.C. § 4007(b); see also 12 C.F.R. § 229.41. The preemptive scope of EFAA described in § 4007 and the relevant portions of Regulation CC, is quite narrow. Only state laws that establish different timing or disclosure requirements than EFAA or otherwise directly conflict with EFAA face preemption. Congress expressed no desire to preempt state laws or causes of action that supplement, rather than contradict, EFAA.

Section 229.38(g) bars "any action under this subpart" unless commenced "within one year after the date of the occurrence of the violation involved." There is no language that makes the limitations period applicable to the various state causes of actions that First Union and Bank One assert against Mellon. However, the Court is required "to examine congressional intent." Basing a judgment on the wording of section 229.28(g) alone, one would conclude that this section exhibits no congressional or agency intent to preempt any state

period of limitation that applies to a state action for mishandling of checks. In fact, subsection (a) of 229.38 explicitly states that "[t]his section does not affect a paying bank's liability to its customer under the U.C.C. or other law."

The sparse legislative history for this section of Regulation CC indicates that the Board of Governors of the Federal Reserve System did contemplate what actions would be covered by the statute of limitations set forth in section 229.38(g). See 53 Fed. Reg. 19372-01 (May 27, 1988) ("This paragraph was revised to refer to action under this subpart instead of this section in order to include actions brought under other sections of this subpart such as § 229.35(b)"). There is no indication that the Board of Governors intended the one-year statute of limitations to apply to any and all causes of action that involved misconduct in the check collection process. Rather, the one year limitations period was to apply only to violations under subpart C of Regulation CC. Therefore, the only claims that will be governed by the one-year limitations period found in 12 C.F.R. § 229.38(g) are those claims brought pursuant to subpart C of Regulation CC.

However, because the Court has determined liability for the face amount of the Check based upon the parties' state law claims, the Court need not further examine the application of the Regulation CC statute of limitations except to emphasize

that First Union's and Bank One's state law claims are not barred by 12 C.F.R. § 229.38(g).

B. Mellon's Liability to First Union

Plaintiff, First Union, moves for partial summary judgment against Mellon on Counts III and V of its complaint. Count III alleges breach of a collecting bank's duty to account to its customer under Article 4 of the UCC. Count V alleges unjust enrichment.

Under the provisions of the UCC, the liability of a bank is determined by the law of the jurisdiction in which the bank is located. UCC § 4-102(b). Thus, First Union's liability is governed by Georgia or North Carolina law,[1] Mellon's by Pennsylvania law and Bank One's by Illinois law. Fortunately, the UCC has been adopted in substantially the same format in each jurisdiction. Compare 13 Pa. Cons. Stat. Ann. § 4215(d) with 810 Ill. Comp. Stat. Ann. 5/4-215(d) and N.C. Gen. Stat. § 25-4-213(d) and Ga. Code Ann. § 11-4-215(d).

Section 4-215(d) of the UCC provides:

> If a collecting bank receives a settlement for an item which is or becomes final, the bank is accountable to its customer for the amount of the item and any provisional credit given for the item in an account with its customer becomes final.

1. First Union's complaint alleges that it is a national banking association with its principal place of business located in North Carolina. However, in its motion moving for partial summary judgment, First Union asserts that it is governed by the law of Georgia because the processing center for First Union's checks is physically located in Atlanta, Georgia.

First Union's argument is straightforward. Bank One, the drawee bank, made final payment on the subject Check, an item in the amount of $507,598.30. Final payment triggered accountability along the chain of collection. Therefore, Mellon, the collecting bank that received settlement for an item which became final, is accountable to First Union, its customer, for the amount of the item, $507,598.30. The fact that First Union encoded the item in the wrong amount is irrelevant, because once final payment occurred, the drawee bank and each collecting bank along the chain of collection is strictly accountable to its respective customer for the amount of the item, here $507,598.30.

Mellon argues that for purposes of § 4-215(d) the "amount of the item" for which a collecting bank is accountable is the encoded amount of the check, as long as the encoded amount is less than the face amount of the check or, alternatively, whichever is less. Therefore, because Bank One made final payment on the under-encoded check in the amount of $0.00 on January 13, 1998, that is the amount for which Mellon is accountable. Mellon further argues that the fact that Bank One subsequently issued an unexplained adjustment to Mellon does not alter the fact that final payment was made prior to that time and in an amount which valued the Check as $0.00.

Mellon finds support for its position in First Nat'l Bank of Boston v. Fidelity Bank, N.A., 724 F. Supp. 1168 (E.D. Pa. 1989). In that case, plaintiff bank under-encoded a $100,000 check as a $10,000 check. The defendant, the payor bank, charged the drawer's account in the lesser amount, and remitted that sum to plaintiff. When plaintiff bank made demand upon defendant bank for the $90,000 deficit, the drawer's account was insufficient to cover it. The First Nat'l Bank of Boston court held that "as between the encoding bank and all other banks in the collecting process, . . . the encoder is estopped from claiming more than the encoded amount of the check." Id. at 1172.

This appears to support Mellon's position, however, the court reasoned that this equitable defense was available "where plaintiff's encoding error caused the payor bank to suffer a loss which it could not avoid by charging its customer's account." Id. at 1171. In the case at bar, the drawee bank, Bank One, successfully charged its customer's account for the face amount of the Check and remitted that amount to Mellon, albeit without proper documentation. Mellon, in turn, held onto the funds relying on the fact that Bank One had made "final payment" the prior day in the encoded amount of $0.00. The holding of First Nat'l Bank of Boston, does not entitle Mellon to hold onto funds properly debited from the maker of a check

midway along the chain of collection because of an encoding error made by the depository bank.

The equitable defense described in First Nat'l Bank of Boston, would only come into play if (1) Bank One charged its customer, LCI, the under-encoded amount; (2) Bank One remitted the under-encoded amount along the chain of collection to Mellon; and (3) upon First Union's demand to collect the higher, face amount of the check from either Mellon or Bank One, the maker of the check, LCI, had insufficient funds in its account to cover that higher amount. In this fictional scenario, First Union would be estopped from collecting the face amount of the check under First Nat'l Bank of Boston because First Union's encoding error caused the loss which could not be avoided by charging the drawer's account.

Mellon's reliance on Bank One's final payment on the encoded amount within the midnight deadline does not change the analysis under § 4-215(d). The midnight deadline provisions of § 4-302 and the final payment provisions of § 4-215(a) are only relevant with respect to the time at which a bank's accountability for the retained check is triggered. The rules of final payment and the midnight deadline do not dictate whether "the amount of the check" for purposes of § 4-215(d) is the encoded amount or the face amount when those two differ. As the case relied on by Mellon points out, there is no support for

the broad proposition that final payment of the amount of an item for § 4-215 purposes is the encoded amount, rather than the face amount of the check. See First Nat'l Bank of Boston, 724 F. Supp. at 1172.

In another leading under-encoding case, which provides guidance, the Georgia Court of Appeals held that a depository bank could recover the amount of the deficiency from the drawee bank where the latter debited its customer's account only the encoded amount of an under-encoded check mis-encoded by the depository bank. Georgia Railroad Bank & Trust Co. v. First Nat'l Bank & Trust Co. of Augusta, 139 Ga. App. 683, 229 S.E.2d 482 (Ga. Ct. App. 1976), aff'd 235 S.E.2d 1 (Ga. 1977). In that case, plaintiff bank erroneously encoded a $25,000 check as a $2,500 check. The defendant, the drawee bank, charged the drawer's account in the lesser amount, and remitted that sum to plaintiff. The error was not discovered for several weeks, by which time the cancelled check had already been returned to the maker. When plaintiff made demand upon the defendant for the deficiency, the defendant brought the error to the maker's attention, but the latter refused to allow the defendant to charge his account the additional $22,500, despite the fact that sufficient funds existed in the account. The Georgia court held, without extended discussion, that the defendant was liable to the plaintiff for the face amount of the check. The court

first reasoned that the defendant bank was accountable to the plaintiff bank for the amount of the item pursuant to two code sections: (1) under § 4-213(1),[2] defendant bank was accountable because it had made "final payment" by charging the maker's account, albeit in the wrong amount; and (2) under § 4-302, defendant bank was strictly accountable by retaining the check beyond the midnight deadline without completely settling for it. Thus, because the defendant was accountable to plaintiff for the item and, more significantly, because the drawer's account contained sufficient funds to cover the face amount of the check, which would allow the loss to be shifted from the shoulders of the drawee bank, the Georgia court held the defendant drawee bank liable to the plaintiff collecting bank for the full amount of the check and not the under-encoded amount.

The common denominator between First Nat'l Bank of Boston and Georgia R.R. Bank and Trust Co., is the principle that ultimate liability for encoding errors should rest on the shoulders of the depository bank that makes the error when deciding who should bear the loss between the depository bank, the collecting bank and the drawee bank. However, in the usual case, such as the case at bar, the parties can be put back into their original positions, with no party sustaining a loss. In

2. Section 4-213 is the predecessor code section to 4-215.

the instant case, the payee has been credited with the face amount of the check by the depository bank, which is awaiting to collect the funds through the collection chain. The drawer has been debited by the drawee bank in the face amount of the check. The drawee bank has remitted the face amount of the check to the intermediary collecting bank. All that is needed to complete the chain is for the intermediary collecting bank to remit the funds to the depository bank.

The Court finds that Mellon did not properly account to First Union after receiving final settlement on the face amount of the check in violation of § 4-215(d) and Orders Mellon to remit $507,598.30 to First Union. Because the Court has found Mellon liable for the face amount of the Check pursuant to § 4-215(d), it does not address First Union's claim of unjust enrichment.

C. First Union's liability to Bank One

Bank One moves for summary judgment against First Union on its counterclaim for breach of presentment warranty under the UCC and under a restitution theory for Bank One's mistaken double payment.

UCC § 4-208 provides in relevant part:

> Presentment warranties.
>
> (a) If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, (i) the person obtaining payment or acceptance, at the time of

> presentment . . . warrant to the drawee that pays or accepts the draft in good faith that:
>
> > (1) the warrantor is or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft[.]

Bank One alleges that First Union breached its presentment warranty at the time it presented the photocopy of the Check to Bank One for payment. Bank One argues that First Union was not "a person entitled to enforce" the Check because the Check had already been paid in January 1998 when it was presented by Mellon as collecting bank for First Union. Therefore, Bank One's obligations had already been discharged and there was nothing left to "enforce."

The subsection (a)(1) warranty that a person is "entitled to enforce" an instrument is in effect a warranty that there are no unauthorized or missing endorsements and allocates the risk of loss for forged or fraudulent instruments to the presenting bank. See U.C.C. § 3-417, cmt. n.2.[3] Bank One does not allege, nor is there evidence in the record, which suggests that the photocopied Check contained missing or unauthorized endorsements.

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3. Section 4-208 conforms to Section 3-417 and extends the presentment warranty to items. The substance of Section 4-208 is discussed in the Comment to Section 3-417. See U.C.C. § 4-208 cmt.

The Court does not find support for Bank One's contention that First Union's mistaken presentment of the Check through the collection process a second time amounts to a breach of presentment warranty under the UCC. This is particularly so in light of First Union's allegations that it contacted Bank One to determine the payment status of the Check and that Bank One represented to First Union that the Check had never been paid, (facts which Bank One disputes), prior to presenting the photocopy for payment. Further, the fact that Bank One's obligations had already been discharged and there was nothing left to enforce on the Check was knowledge better available to Bank One, the drawee bank, and the bank that had paid the Check on the first trip through the collection process. Consequently, it is inappropriate to shift the loss to the presenting bank for this error.

In its second argument for partial summary judgment against First Union, Bank One maintains that it is entitled to restitution from First Union for a payment made under a mistake of fact. With this argument, Bank One moves from the UCC to equitable principles. Therefore, with respect governing law, UCC § 4-102(b) is no longer applicable. However, both parties agree that Illinois law governs the conduct of Bank One and also agree that the equitable principles discussed below are

substantially the same in any state that could conceivably govern this dispute.

The doctrine of money paid by mistake is stated generally at Restatement (First) of Restitution § 20 and provides:

> A person who has paid another an excessive amount of money because of an erroneous belief induced by a mistake of fact that the sum paid was necessary for the discharge of a duty, for the performance of a condition, or for the acceptance of an offer, is entitled to restitution.

The undisputed facts reflect that, only upon the erroneous belief of both First Union and Bank One that Bank One had not yet paid the subject Check, First Union submitted the photocopy for payment directly to Bank One and Bank One, through its automated system, mistakenly paid the Check a second time. This scenario appears to be suitable for application of the doctrine of payment made under a mistake of fact.

First Union counters that Bank One is estopped from pursuing restitution. To establish the defense of estoppel, the party claiming estoppel must demonstrate that: (1) the other party misrepresented or concealed material facts; (2) the other party knew at the time they made their representations that the representations were untrue; (3) the party claiming estoppel did not know that the representations were untrue when the representations were made and when they were acted upon; (4) the other party intended or reasonably expected the representations

to be acted upon by the party claiming estoppel or by the public generally; (5) the party claiming estoppel reasonably relied upon the representations in good faith and to their detriment; and (6) the party claiming estoppel has been prejudiced by his reliance on the representations. Parks v. Kownacki, 737 N.E.2d 287, 296 (Ill. 2000).

For purposes of Bank One's motion for partial summary judgment, the Court must accept as true that, upon discovering that it had never collected the face value of the Check, First Union called Bank One to ascertain whether Bank One had ever made payment on the Check. It is further accepted that Bank One reported in that telephone conversation that it had no record of paying the Check. First Union contends that Bank One's statement that the Check had never been paid constitutes the untrue representations establishing prong one of the estoppel test set forth above. However, First Union has not established that Bank One knew, at the time it made its representations, that such representation was untrue and therefore, fails to meet the second of the estoppel requirements.

First Union asserts that Bank One knew or should have known from its own records that it had already paid the Check. There is nothing in the record to support this bald allegation. Furthermore, Bank One's actions in paying the face amount of the Check for the second time, clearly advises against making such

an inference. The fact that Bank One had documentation somewhere in its possession that would have shown that the Check had been previously paid does not amount to current knowledge of the speaker who participated in the telephone conversation with First Union that, at the time the representation was made, such statement was untrue.

First Union is also unable to meet the last of the estoppel requirements, by showing that it has been prejudiced by reliance on the representation. First Union asserts that it will be prejudiced only if the Court finds (a) that Mellon has a legitimate defense to repaying First Union, and (b) that First Union must nevertheless repay Bank One. Because the Court has decided that Mellon is liable to First Union for the face amount of the Check, First Union will not be prejudiced by the Court's Order to pay over to Bank One the amount it recoups from Mellon (a payment which First Union has already stipulated that it is willing to make).

Thus, the Court grants Bank One's motion for partial summary judgment with respect to its restitution claim that it paid money to First Union by mistake.

D. Bank One's Liability to Mellon

Bank One also moves for summary judgment on Mellon's cross claim against it. Mellon alleges that Bank One did not notify it of any difficulties or issues concerning the Check for

almost two years and that such an extensive time deprived Mellon of the ability to take corrective action with respect to the application of the funds. Therefore, Mellon argues, to the extent that it is deemed liable to First Union National Bank, Bank One is liable over to Mellon by way of contribution and/or indemnity for its breach of ordinary care.

As the Court has explained above, Mellon is liable to First Union for the face amount of the Check because Mellon was accountable to First Union under UCC § 4-215(d) and because the drawer's account contained sufficient funds to cover the face amount of the Check. While the passage of time and alleged lack of documentation undoubtedly made it more difficult for Mellon to properly remit the funds to First Union, this does not, as a matter of law, necessitate that Bank One sustain a loss for the subject Check.

The Court's rulings, finding Mellon liable to First Union and First Union liable to Bank One places the parties back in their original positions, with no party sustaining a loss. The fact that Mellon must now remit the face amount of the Check to First Union cannot be correctly characterized as a loss, despite Mellon's arguments that it retained no benefits because it applied the funds against other outstanding cash letter debits. Mellon's use of the funds in this manner did indeed provide a benefit to Mellon in that Mellon would have likely had

to pursue these debits in litigation or write off as losses. Bank One's motion for summary judgment on Mellon's cross claim against it granted.

IV. CONCLUSION

For the reasons stated above, the state law claims asserted against Mellon are not barred by the one-year statute of limitations found at 12 C.F.R. 229.38(g). First Union's partial motion for summary judgment against Mellon is granted. Mellon has breach its duty to account to First Union pursuant to UCC § 4-215(d) and is liable for the face amount of the Check. Bank One's partial motion for summary judgment against First Union is also granted. Bank One is entitled to restitution in the face amount of the Check for its mistaken payment to First Union. Finally, Bank One's motion for summary judgment with respect to Mellon's cross claim for contribution and/or indemnity is also granted.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FIRST UNION NATIONAL BANK,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	No. 01-CV-1204
BANK ONE, N.A.	:	
and	:	
MELLON BANK, N.A.,	:	
Defendants.	:	

ORDER

AND NOW, this 28th day of March, 2002, upon consideration of Plaintiff First Union National Bank's Motion for Partial Summary Judgment Against Defendant Mellon Bank, N.A. (Docket No. 20), together with Mellon Bank's response thereto and other matters of record, it is hereby **ORDERED** that Plaintiff's motion is **GRANTED** and partial summary judgment is entered in favor of First Union National Bank and against Mellon Bank, N.A. in the amount of $507,598.30. It is further **ORDERED** that Mellon Bank, N.A. remit to First Union National Bank $507,598.30 within ten (10) days of the date of this Order.

Upon consideration of Defendant Bank One, N.A.'s Motion for Partial Summary Judgment Against Plaintiff First Union National Bank and Defendant Mellon Bank (Docket No. 21),

together with First Union National Bank's and Mellon Bank, N.A.'s responses thereto and other matters of record, it is hereby **ORDERED** that Bank One N.A.'s motion is **GRANTED** and partial summary judgment is entered in favor of Bank One, N.A. and against First Union National Bank in the amount of $507,598.30 and in favor of Bank One, N.A. and against Mellon Bank, N.A. with respect to Mellon Bank N.A.'s cross claim for contribution and/or indemnity. It is further **ORDERED** that First Union National Bank remit to Bank One, N.A. $507,598.30 within ten (10) days of the date of this Order.

Upon consideration of Defendant Mellon Bank N.A.'s Cross-Motion for Summary Judgment (Docket no. 23), it is hereby **ORDERED** that Mellon Bank's motion is **DENIED** with respect to the state law claims asserted by First Union National Bank and Bank One, N.A.

The parties are further **ORDERED** to notify the Court within twenty (20) days of this Order of the issues, if any, which remain in this case for trial.

BY THE COURT:

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RONALD L. BUCKWALTER, J.